

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
BURLINGTON NORTHERN RAILROAD
COMPANY, INC.,

Appellant,

v.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCRB No. 81-2

ORDER DISMISSING APPEAL

This matter, the appeal of a \$250 civil penalty for open burning allegedly in violation of Section 400-035 of the General Regulations of respondent, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington, Chairman, and Gayle Rothrock, Member, convened at Vancouver, Washington, on September 2, 1981. William A. Harrison, Administrative Law Judge, presided.

Appellant appeared by its attorney Delbert W. Johnson. Respondent appeared by its attorney James D. Ladley. Reporter Betty Koharski recorded the proceedings.

1 At the outset of the proceedings, both parties presented oral
2 argument relating to respondent's "Motion to Dismiss for Failure to
3 File Appeal in a Timely Fashion." Having considered:

4 1. Respondent's "Motion to Dismiss for Failure to File Appeal in
5 a Timely Fashion" filed on April 8, 1981, and

6 2. Appellant's Affidavit and Memoranda filed on August 25, 1981,
7 and

8 3. Oral argument of counsel for both parties, and

9 4. The records and file herein, and

10 being fully advised, the Board enters the following ORDER:

11 The facts pertinent to whether this appeal was timely filed are
12 undisputed. The order of respondent from which Burlington Northern
13 Railroad Company (BN) appeals was addressed to BN at its Portland,
14 Oregon, address without specification of any particular person or
15 department. The order was received by BN's Marketing Department in
16 Portland on December 5, 1980. This was a Friday. The Marketing
17 Department routed the order to BN's registered agent for Oregon, also
18 in Portland, who received it on December 8, 1980, the following Monday.

19 The notice of appeal which BN lodged with this Board was mailed on
20 January 8, 1981, and received on January 13, 1981.

21 This Board's enabling statute provides at RCW 43.21B.120 that:

22 Any order issued by...any air pollution
23 control...authority...shall become final unless, no
24 later than thirty days after the date that the
25 notice and order are served, the person aggrieved by
26 the order appeals to the hearings board as provided
27 for in this act.

28 The same statute provides at RCW 43.21B.230:

29 ORDER DISMISSING APPEAL

1
2 Any person having received notice of a denial of a
3 petition, a notice of determination, notice of or an
4 order made by the department under the provisions of
5 this 1970 amendatory act may appeal, within thirty
6 days from the date of the notice of such denial,
7 order, or determination to the hearings board. The
8 appeal shall be perfected by serving a copy of the
9 notice of appeal upon the department or air
10 pollution authority established pursuant to chapter
11 70.94 RCW, as the case may be, within the time
12 specified herein and by filing the original thereof
13 with proof of service with the clerk of the hearings
14 board.

15 From this, the parties present two legal issues: 1) when did the
16 30-day period for appeal begin, and 2) when was BN's appeal perfected?

17 When did the 30-day period for appeal begin? The 30-day period
18 for appeal began on December 5, 1980, the date upon which the order
19 was "served" upon BN, RCW 43.21B.120, and upon which BN received
20 "notice" of such order, RCW 43.21B.230. These statutory prescriptions
21 do not specify that such service or notice can only be effected upon a
22 corporation's registered agent, as BN contends. Further, we reject
23 the argument advanced by BN that chapter 4.28 RCW relating to
24 commencement of civil actions in superior courts of this state governs
25 service of the administrative orders from which appeal may be made to
26 this Board. (Although RCW 4.28.080(10) appears to allow service of
27 summons on "any agent," not just the registered agent, of a foreign
corporation such as BN.)

When was BN's appeal perfected? Just as RCW 43.21B.230, above,
specifies that an appeal shall be perfected by "filing" with this
Board, our rules of procedure provide, at WAC 371-08-080:

The Notice of Appeal shall be filed within thirty
days from the date the copy of the order or decision

1 of the Department or other state agency or pollution
2 control board (or authority) was communicated to the
appealing party. (Emphasis added.)

3 The general rule is that a document is "filed" when it is actually
4 received by the proper authority. Hamma Hamma v. Shorelines Hearings
5 Board, 85 Wn. 2d 441, 536 P. 2d 157 (1975) and Mackey v. Champlin, 68
6 Wn. 2d 398, 413 P.2d 340 (1966) cited therein. An appeal is filed
7 only when this Board actually receives a notice of appeal.¹ This is
8 the interpretation which we have applied consistently in cases before
9 us. William C. Markham v. Puget Sound Air Pollution Control Agency,
10 PCHB No. 483 (1974); Coast Investment Co. (Viceroy Apartments v. Puget
11 Sound Air Pollution Control Agency, PCHB No. 470 (1974); Trinidad
12 Corp. (SS HOUSTON) v. Puget Sound Air Pollution Control Agency, PCHB
13 No. 715 (1974); Trans American Development & Construction, Inc. v.
14 Puget Sound Air Pollution Control Agency, PCHB No. 773 (1975); Hillis
15 Homes, Inc. and First Bank Mortgage Co. v. Puget Sound Air Pollution
16 Control Agency, PCHB No. 945 (1976); and M. G. Development Corp. v.
17 Puget Sound Air Pollution Control Agency, PCHB No. 1118 (1977);
18 Buffelen Woodworking Co. v. Puget Sound Air Pollution Control Agency,
19 PCHB No. 77-8 (1977); Seattle Textured Coatings v. Puget Sound
20

21 1. BN cites WAC 1-08-130 of the Code Reviser's Uniform Procedural
22 Rules relating to "service of process." Chapter 1-08 WAC is
23 specifically replaced by our own rules of procedure, chapter
24 371-08 WAC, in matters before this Board except where specifically
25 noted. WAC 371-08-031. There is no such specific notation
26 bringing chapter 1-08 WAC to bear upon perfection of an appeal
27 either in WAC 371-08-080, above, or elsewhere. Our WAC 371-08-080
providing that a notice of appeal shall be "filed" with this Board
(consistent with RCW 43.21B.230) governs our cases and WAC
1-08-130 does not apply.

1 Air Pollution Control Agency, PCHB No. 77-127 (1977); James Phillips
2 v. Department of Ecology, PCHB No. 80-24 (1980); Coastal Coatings,
3 Inc. v. Puget Sound Air Pollution Control Agency, PCHB No. 80-187
4 (1981); Ed Coaker v. Puget Sound Air Pollution Control Agency, PCHB
5 No. 80-207 (1980). We conclude that BN's appeal was filed when its
6 notice of appeal was actually received by this Board on January 13,
7 1981.

8 Because the period of appeal began on December 5, 1980, such
9 appeal was not perfected within 30 days and must be dismissed. RCW
10 43.21B.120 and .230; WAC 371-08-080.

11 Even if the 30-day period for appeal were to begin on December 8,
12 1980, the date when the order of respondent was received by BN's
13 registered agent, the appeal which was received by the Board on
14 January 13, 1981, would still not have been filed within the required
15 30-day period.

16 NOW THEREFORE IT IS ORDERED that respondent's "Motion to Dismiss
17 for Failure to File Appeal in a Timely Fashion" is granted.

18
19 The Board having conducted a hearing of the merits in this case on
20 September 2, 1981, immediately following arguments on the above motion
21 to dismiss which was not then ruled upon, and

22 Witnesses having been sworn and testified, and exhibits having
23 been examined, the Board now notes these Findings of Fact, Conclusions
24 of Law and Order on the merits of the case which would have been
25 entered as a result of the hearing of September 2, 1981, had the above
26 Motion to Dismiss not been granted:

1 FINDINGS OF FACT

2 I

3 Neither party having elected a formal hearing, this hearing was
4 informal as that term is used in RCW 43.21B.230.

5 II

6 On December 3, 1980, respondent's inspector, while on routine
7 patrol, observed an outdoor fire near North Bonneville, Washington.
8 This fire was ignited by the appellant's, Burlington Northern Railroad
9 Company (BN), employees who were engaged in repair of the BN track.
10 The fire was approximately four feet in diameter by two feet high,
11 contained a creosoted timber one foot thick and two feet long,
12 contained wooden pallets and emitted dark gray smoke. The creosoted
13 timber was used to start the fire; the primary purpose of the fire was
14 to provide warmth to the workers, on that winter day, as they carried
15 out their work.

16 III

17 Outdoor fires are contrary to an express, written directive of BN
18 prohibiting such fires in the area concerned for reasons of air
19 pollution and fire control. (Exhibit R-4). The foreman of the BN
20 work crew was unfamiliar with this company directive and with
21 respondent's regulations on open burning. His work for BN had only
22 recently brought him to this state and the site in question. No
23 permit for the fire was sought or obtained from respondent.

24 IV

25 The inspector issued a "Field Notice of Violation" to BN's foreman
26 on the site that day. Later, on December 5, 1980, BN received from
27

1 respondent a "Notice of Violation" imposing a civil penalty of \$250
2 for alleged violation of Section 400-035 of respondent's regulations
3 which governs outdoor fires. From this, appellant appeals.

4 V

5 Any Conclusion of Law which should be deemed a Finding of Fact is
6 hereby adopted as such.

7 From these Findings of Fact comes the following

8 CONCLUSIONS OF LAW

9 I

10 The Legislature of Washington State has enacted this policy on the
11 subject of outdoor burning at RCW 70.94.740 of the State Clean Air Act:

12 It is the policy of the state to achieve and
13 maintain high levels of air quality and to this end
14 to minimize to the greatest extent reasonably
15 possible, the burning of outdoor fires. Consistent
16 with this policy, the legislature declares that such
17 fires should be allowed only on a limited basis
18 under strict regulation and close control.

16 Air pollution control authorities, such as respondent, shall establish
17 a program implementing this policy. RCW 70.94.755.

18 II

19 Section 400-035 of respondent's regulations sets forth its program
20 regarding open fires. This provides, in pertinent part:

21 No person shall ignite, cause to be ignited, permit to be
22 ignited, or suffer, allow, or maintain any open fire
23 within the jurisdiction of the Authority, except as
24 provided in this Regulation.

- 25 (1) Fires set only for recreational purposes or
26 cooking of food for human consumption are
27 excepted from provisions of this regulation
provided no nuisance is created.

1 (2) Open burning may be done under permit:

2 (a) Burning permits may be provided by the
3 local fire department, fire district or
4 Washington State Department of Natural
5 Resources.

6 (b) No permit shall be issued unless the
7 Control Officer is satisfied that:

8 (i) No practical alternate method is
9 available for the disposal of the
10 material to be burned. (The
11 Authority has a written Open Outdoor Fire
12 Policy describing times, areas and kinds
13 of permitted open fires.)

14 (ii) No salvage operation by open burning
15 will be conducted.

16 (iii) No garbage will be burned.

17 (iv) No animals will be disposed of by
18 burning.

19 (v) No material containing asphalt,
20 petroleum products, paints, rubber
21 products, plastic or any substance
22 which normally emits dense smoke or
23 obnoxious odors will be burned.

24 III

25 By causing ignition of an open fire containing a creosoted timber,
26 appellant violated respondent's Section 400-035(2)(b)(v) prohibiting
27 open burning of material containing petroleum products.

IV

28 Alternatively, even were there no creosoted timber involved, by
29 causing ignition of an open fire not set only for recreation or
30 cooking, and without respondent's permit, appellant violated
31 respondent's Section 400-035(2).

V

Respondent urged, but did not prove, that the fire in question was contrary to its "Open Outdoor Fire Policy" cited at Section 400-035(2)(b)(i). That written policy was never offered into the record of this case.

VI

The amount of the penalty is reasonable and should be affirmed.

VII

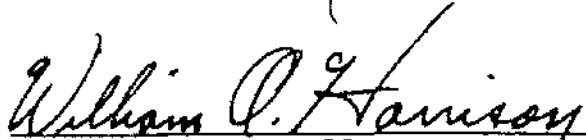
Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The violation and \$250 civil penalty are each affirmed.

DONE at Lacey, Washington, this 12th day of November, 1981.



WILLIAM A. HARRISON
Administrative Law Judge

POLLUTION CONTROL HEARINGS BOARD



NAT W. WASHINGTON, Chairman



GAYLE ROTHROCK, Vice Chairman